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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte CHARLES ELDERING and M. LAMINE SYLLA

Appeal 2009-004256
Application 09/857,160
Technology Center 3600

Decided: May 28, 2010

Before, MURRIEL E. CRAWFORD, JOSEPH A. FISCHETTI and BIBHU R. MOHANTY, *Administrative Patent Judges*.

FISCHETTI, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Appellants seek our review under 35 U.S.C. § 134 of the Examiner's final rejection of claims 1-4, 15-23. We have jurisdiction under 35 U.S.C. § 6(b) (2002).

SUMMARY OF DECISION

We AFFIRM.

THE INVENTION

Appellants claim a system and method for monitoring a plurality of viewing sessions and clustering the viewing sessions such that the sessions within a cluster have a common identifier. (Abstract)

Claim 1, reproduced below, is representative of the subject matter on appeal.

1. In a data processing system, a method of identifying a subscriber comprising the steps of:

(a) monitoring a plurality of viewing sessions;
(b) clustering the plurality of viewing sessions wherein the sessions within a cluster have a common identifier, wherein the common identifier is representative of subscriber selection data, and wherein the clustering occurs independently of subscriber characteristics established prior to the monitoring of step (a); and
(c) identifying a subscriber as belonging to one of the clusters by comparing a plurality of subscriber selections to the subscriber selection data corresponding to the clusters of viewing sessions.

THE REJECTION

The Examiner relies upon the following as evidence of unpatentability:

Williams	5,977,964	Nov. 2, 1999

The following rejection is before us for review.

The Examiner rejected claims 1-4, 15-23 under 35 U.S.C. § 103(a) as being unpatentable under 35 U.S.C. § 103(a) over Williams in view of Examiner's Official Notice.

ISSUE

Have Appellants shown that the Examiner erred in rejecting claims 1-4, 15-23 on appeal as being unpatentable under 35 U.S.C. § 103(a) over Williams in view of Examiner's Official Notice on the grounds that a person with ordinary skill in the art would understand that a system monitoring channels watched and categorized by program genre information taken from such monitoring clusters viewing sessions with a common identifier representative of subscriber selection data genre?

PRINCIPLES OF LAW

"Section 103 forbids issuance of a patent when 'the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains.'" *KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398, 406 (2007). The question of obviousness is resolved on the basis of underlying factual determinations including (1) the scope and content of the prior art, (2) any differences between the claimed subject matter and the prior art, (3) the level of skill in the art, and (4) where in evidence, so-called secondary considerations. *Graham v. John Deere Co.*, 383 U.S. 1, 17-18 (1966). *See also KSR*, 550 U.S. at 407 ("While the sequence of these questions

might be reordered in any particular case, the [*Graham*] factors continue to define the inquiry that controls.")

FINDINGS OF FACT

We find the following facts by a preponderance of the evidence:

1. Williams discloses that the "… user profile database 800 tracks user preferred channels, volume, program genre information, whether to block content information, and whether supplemental programming is requested with a particular channel. (col. 5, ll. 59-62)

2. Williams discloses that the "system controller 104 determines which commercials a user favors by empirically recognizing which commercials get muted, or which commercials are interrupted (e.g., with a change of channel)." (col. 7, ll. 2-6)

3. Williams discloses that

> in order to accurately monitor and log user inputs, system controller 104 needs to be made aware of the user inputs. In one embodiment, input signals (e.g., channel/station changes, volume changes, web page addresses, device programming inputs, etc.) are input to system 100 via system controller 104, which in turn forwards control signals to the appropriate components to perform the desired function. (col. 8, ll. 25-32)

4. Williams discloses using a weighted value for the television channel being viewed in order to identify and hence match a user with his or her user preferences. (col. 10, ll. 9-13)

ANALYSIS

We affirm the rejection of claims 1-4, 15-23. Initially, we note that the Appellants argue these claims together as a group, selecting representative claim 1 to decide the appeal of these claims, remaining claims 2-4, 15-23 standing or falling with claim 1. *See,* 37 C.F.R. § 41.37(c)(1)(vii)(2004).

Appellants argue that "[i]ndependent claim 1 recites 'monitoring a plurality of viewing sessions... clustering the plurality of viewing sessions'(*.sic*) Viewing sessions naturally include all interactions the user engages in with the system during a particular period of subscriber interaction." (Appeal Br. 10) Appellants thus argue that in Williams the "profile database 800 includes an indication of which programs a particular user prefers, but does not relate to interactions actually made by the viewer during any particular viewing session which is then clustered with other viewing sessions." (Appeal Br. 11) We disagree with Appellants.

Williams explicitly discloses monitoring actual interactions made by the viewer during a particular viewing session. This is apparent from Williams disclosing: 1) the "… user profile database 800 tracks user preferred channels…" (FF 1); 2) the "system controller 104 determines which commercials a user favors by empirically recognizing which commercials get muted, or which commercials are interrupted (e.g., with a change of channel)" (FF 2); and 3) the system accurately monitors user inputs including channel/station changes (FF 3).

Appellants next argue that "Claim 1 recites the clustering or grouping of viewing sessions based on a common identifier among the viewing sessions. Williams compares user interactions with known program demographics." (Appeal

Br. 11) However the claims only require the clusters have a common identifier representative of subscriber data irrespective of where the identifier was derived. Thus, even the known program demographic which is matched to a user's subscriber's data nevertheless commonly identifies the data associated with that type of data.

Appellants next argue that "Williams does not teach or suggest that, 'the clustering occurs independently of subscriber characteristics established prior to the monitoring of the viewing sessions.'" (Appeal Br. 11) We disagree with Appellants. According to one embodiment, in Williams, "the system controller 104 determines which commercials a user favors by empirically recognizing which commercials get muted, or which commercials are interrupted (e.g., with a change of channel)." (FF2) Thus, clustering of muted commercial(s) occurs in Williams without a subscriber characteristic established prior to the monitoring of the viewing sessions as required by the claims.

Additionally, Appellants assert Williams does not disclose "identifying a subscriber as belonging to one of the clusters by comparing a plurality of interactions" because Williams teaches "comparing user interactions to a set of characteristics associated with known users" and "[t]hese characteristics are input into the database." (Appeal Br. 12) We disagree with Appellants because the inputs disclosed by Williams in this context are those which the system controller 104 obtains by monitoring actual user activity (e.g., channel/station changes, volume changes, web page addresses, device programming inputs, etc.), and thus are a plurality of interactions as required by the claims. (FF 1,2,3)

Appellants further argue that the comparing identification step in Williams is not the same as "identifying a subscriber as belonging to one of the clusters by comparing a plurality of interactions." (Appeal Br. 12) We disagree with Appellants because Williams discloses monitoring the present channel being watched to cause the user to be identified. (FF 4)

Appellants challenge for the first time in their Brief the Official Notice taken in the Final Office Action. This challenge is presented as a general allegation without specifically pointing out the supposed errors in the Examiner's taking of Official Notice, "includ[ing] stating why the noticed fact is not considered to be common knowledge or well-known in the art. See 37 CFR § 1.111(b)." MPEP § 2144.03(C). An adequate traverse must contain adequate information or argument to create on its face a reasonable doubt regarding the circumstances justifying Examiner's notice of what is well known to one of ordinary skill in the art. *In re Boon*, 439 F.2d 724, 728 (CCPA 1971). That has not been done here. Also, Appellants present their challenge for the first time on Appeal when they had the opportunity before this point to make that challenge, for example, under a Rule § 1.113 request. When an Appellant does not seasonably traverse a well-known statement during examination, the object of the well-known statement is taken to be admitted prior art. *In re Chevenard*, 139 F.2d 711 (CCPA 1943).

In the alternative, Appellants argue that "Williams does not cluster viewing sessions and identify a user based on user interactions, but rather groups programs based on known user characteristics and known demographic information known

about viewers of a particular program." (Appeal Br. 14) We disagree with Appellants because as found supra (FF 1-4), Williams actually monitors and extracts genre information of content, which genre also serves as an identifier for that content. Genre is not demographic information because it defines subject categories, not people.

CONCLUSIONS OF LAW

We conclude the Appellants have not shown that the Examiner erred in rejecting claims 1-4, 15-23 under 35 U.S.C. § 103(a) as being unpatentable under 35 U.S.C. § 103(a) over Williams in view of Examiner's Official Notice.

DECISION

The decision of the Examiner to reject claims 1-4, 15-23 is AFFIRMED.

AFFIRMED

JRG

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